



Environmental Appeal Board

Procedure Manual

Version 2009/06

ENVIRONMENTAL APPEAL BOARD
PROCEDURE MANUAL

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DISCLAIMER

The legislation referred to in this Manual is subject to amendment from time to time and to judicial interpretation. The Manual may not reflect recent amendments to the legislation and should not be relied upon as an accurate statement of the existing law. It is a guide to the Board's practices and procedures only. An official version of the legislation may be obtained from Crown Publications.

1.0 INTRODUCTION

The Environmental Appeal Board (the "Board") was established in 1982, and is continued under section 93 of the *Environmental Management Act*, S.B.C. 2003, c. 53. It is a quasi-judicial tribunal with statutory authority to hear appeals from administrative decisions made under various environmental statutes.

The formal requirements of the appeal process are set out in the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation*. The *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* apply to **all** appeals to the Board.

In addition to hearing appeals, the Board produces an annual report which is provided to the Legislative Assembly. The annual report contains an overview of the structure and function of the Board, statistics on appeals filed, hearings held, and the published decisions issued within the report period as well as a selection of summaries of those decisions. It also contains the Board's recommendations for legislative change and the statutes and regulations under which the Board has jurisdiction to hear appeals. A copy of the annual report may be obtained from the Board office or website (www.eab.gov.bc.ca).

In order to ensure that the appeal process is open and understandable to the public, the Board has developed this Manual. It contains information about the Board itself, the legislated procedures that the Board is required to follow and the policies the Board has adopted to fill in the procedural gaps left by the legislation.

Those involved in the appeal process can expect the Board to follow the legislated procedures and the policies set out in this Manual. Where any matter arises during the course of an appeal that is not addressed by the legislation or the policies and procedures set out in this document, the Board will do whatever is necessary to enable it to adjudicate fairly, effectively and completely on the appeal. Further, the Board may dispense with compliance with any part or all of a particular procedure when it is appropriate in the circumstances.

The Board will continue to refine and, if necessary, change its policies over time. Any changes made to this Manual will be made available to the public.

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The Board will make every effort to process appeals in a timely fashion and issue decisions expeditiously. Your attention to the procedures and policies outlined in this Manual will assist the Board in achieving this goal.

2.0 THE BOARD

Members

The Board consists of a full-time chair, part-time vice-chair(s) and a number of part-time members. The chair is appointed by Cabinet after a merit based process for an initial term of three to five years. The vice-chair(s) and other part-time members are appointed by Cabinet, in consultation with the chair, after a merit based process for an initial term of two to four years. All of the members may be reappointed for additional terms of up to five years.

The Board has a roster of highly qualified members including professional engineers, biologists, foresters, and lawyers with expertise in the areas of environmental and administrative law. They bring with them a wide range of backgrounds and perspectives.

Role of the Chair

Under section 9 of the *Administrative Tribunals Appointment and Administration Act*, S.B.C. 2003, c. 47, the chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among the members. Some of the chair's specific responsibilities in relation to appeals are found in the *Environmental Management Act* and sections 3 through 7 of the *Environmental Appeal Board Procedure Regulation*.

Role of the Vice-Chair

The vice-chair acts as chair of the Board in the chair's absence.

Composition of panels

Section 93(7) of the *Environmental Management Act* states that the chair may organize the Board into panels consisting of one or more members.

If members of the Board hear an appeal as a panel, the panel has all of the powers, duties and obligations given to the Board. Further, an order, decision or action of a panel is deemed to be an order, decision or action of the Board.

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Where the chair of the Board determines that an appeal will be heard by a panel of the Board, section 4(3) of the *Environmental Appeal Board Procedure Regulation* states that the panel chair is determined as follows:

- (a) if the chair of the Board is on the panel, the chair will be the panel chair;
- (b) if the chair of the Board is not on the panel but the vice-chair is on the panel, the vice-chair will be the panel chair; and
- (c) if neither the chair nor the vice-chair is on the panel, the chair of the Board will designate one of the panel members to be the panel chair.

When determining who will be on a particular panel, the chair will consider the background, qualifications and availability of the members. Most oral hearings will be conducted by a panel of 1 or 3 members, depending on the length and complexity of the hearing. Written appeals are normally considered by a panel of one, usually the chair of the Board.

Quorum

Section 5 of the *Environmental Appeal Board Procedure Regulation* sets out the number of Board members required to constitute a quorum. The section provides that:

- (a) where the members sit as a full Board, 3 members (one of whom must be the chair or vice-chair) constitute a quorum;
- (b) where the members of the Board sit as a panel of 5, the panel chair plus 2 other members constitute a quorum;
- (c) where the members of the Board sit as a panel of 3, the panel chair plus 1 other member constitute a quorum; and
- (d) where there is a panel of 1, the panel chair constitutes a quorum.

Withdrawal or disqualification of a board member on the grounds of bias

Where the chair or a member of a panel becomes aware of any facts that would lead an informed person, viewing the matter reasonably and practically, to conclude that a member, whether consciously or unconsciously, would not decide a matter fairly, the member will be prohibited from conducting the appeal unless consent is obtained from all

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parties to continue. In addition, any party to an appeal may challenge a member on the basis of a real or reasonable apprehension of bias.

To raise an allegation of bias during a hearing, the party should make a motion to the panel. All parties will be given an opportunity to make submissions on the motion before a decision is rendered.

If the panel determines that the allegation has been made promptly and has merit, the panel member will disqualify him/herself and withdraw from the panel hearing the appeal, unless consent is obtained from all parties for that member to continue. If the parties do not consent, the hearing will normally be adjourned until a new member is appointed to the panel by the chair. Alternatively, the remaining members of the panel may continue with the hearing provided there are enough panel members to constitute a quorum.

Correspondence (Communicating) with the Board

To ensure that the appeal process is kept open and fair to the participants, any correspondence directed to the Board in relation to an appeal must be sent to the Board office and be copied to all other parties to the appeal. Correspondence should be addressed to the Chair, the Registrar or other staff at the Board office, and not to individual Board members.

Members will not contact a party, accept personal telephone calls from a party or attend private meetings with a party while that party is involved in the appeal process, unless that member puts all of the other parties on notice and gives them an opportunity to participate. Nor will a member discuss his or her reasons for a decision. Once a decision is rendered in an appeal, the decision “speaks for itself”.

Board Office

The Board shares an office and staff with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal and a number of other administrative tribunals. The combined office has a small full-time staff consisting of an Executive Director, Registrar, Office Administrator, Manager of Research and Mediation, Research Officer, and support staff. The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board and the other tribunals that are administered through the office.

Any questions regarding an appeal or a practice or procedure of the Board should be directed to this office. The office is located at:

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Environmental Appeal Board
4th Floor, 747 Fort St.
Victoria BC V8W 3E9
Phone: (250) 387-3464
Fax: (250) 356-9923
Website: www.eab.gov.bc.ca

The office's mailing address is:

Environmental Appeal Board
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

3.0 FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

If information regarding an appeal is requested by a member of the public, that information may be disclosed. The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act.

Unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*, it will be disclosed. Parties to appeals should be aware that information supplied to the Board may be subject to public scrutiny and review.

4.0 THE APPEAL PROCESS

4.1 Filing an Appeal

What can be appealed

Section 93(1) of the *Environmental Management Act* gives the Board the power to hear appeals from decisions made by government officials under various statutes. The Board currently has jurisdiction to hear appeals made under four statutes:

Environmental Management Act, S.B.C. 2003, c. 53, as amended

Integrated Pest Management Act, S.B.C. 2003, c. 58, as amended

Water Act, R.S.B.C. 1996, c. 483, as amended

Wildlife Act, R.S.B.C. 1996, c. 488, as amended

The types of decisions that are appealable to the Board vary from statute to statute. To determine whether a particular decision may be appealed to the Board, the statute under which the decision was made must be consulted. The types of decisions that are appealable under each statute are summarized below:

Statute	What can be appealed
<i>Environmental Management Act</i>	A "decision", as defined in section 99 of the <i>Environmental Management Act</i> , made by a director or district director.
<i>Integrated Pest Management Act</i>	A "decision", as defined in section 14(1) of the <i>Integrated Pesticide Management Act</i> .
<i>Water Act</i>	Certain decisions, specified in section 92 of the <i>Water Act</i> , of the comptroller, the regional water manager or engineer.
<i>Wildlife Act</i>	Decisions of a regional manager or director affecting a licence, permit, trapline registration, or guide outfitters certificate or an application for any of the above.

Who can appeal

The statute that provides for an appeal to the Board will also specify the people (including corporations and registered societies) who can appeal.

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These people are said to have “standing” to appeal. A summary of the people that have been granted standing to appeal a decision to the Board is provided below:

Statute	Who may appeal (standing before the Board)
<i>Environmental Management Act</i>	A person who is aggrieved by a decision of a director or district director.
<i>Integrated Pest Management Act</i>	Any person.
<i>Water Act</i>	A person that may appeal an order depends on the type of order made.
<i>Wildlife Act</i>	A person whose licence, permit, registration of a trapline, or guide outfitter’s certificate is affected by a decision of the regional manager or director, or a person whose application for any of the above are affected by the decision.

If a person does not fall within the group of persons granted standing to appeal under the statute, the Board cannot accept the appeal.

How to appeal

To appeal a decision, a person with standing to appeal must file a notice of appeal with the Board office. Section 3 of the *Environmental Appeal Board Procedure Regulation* states that certain things **must** be included in a notice of appeal for it to be accepted. The notice of appeal must include:

1. The name and address of the appellant.
2. The name of the appellant’s lawyer or agent (spokesperson), if any.
3. The address for service of the appellant.
4. The grounds for the appeal (provide a detailed explanation of the appellant’s objections to the decision; describe errors in the decision).

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5. The particulars relevant to the appeal (describe any background facts that relate to the appeal including how you are affected by the decision or order).
6. A description of the relief or remedy requested (what do you want the Board to order at the end of the appeal).
7. The signature of the appellant or the appellant's lawyer or agent.
8. An appeal fee of \$25.00 for each decision that is being appealed (see "Appeal fees", below).

A copy of the decision that is being appealed (e.g., the permit, licence, application, order, rejection etc.) should be included with the notice of appeal.

Section 3 of the *Environmental Appeal Board Procedure Regulation* states that, unless otherwise directed under the statute that authorizes the appeal, the notice of appeal must be mailed by registered mail or by leaving a copy of the notice of appeal at the Board office during normal business hours.

The Board will also accept a notice of appeal by facsimile with the original copy of the notice of appeal and the prescribed fee to follow.

If the appeal is not commenced in accordance with the *Environmental Management Act*, the *Environmental Appeal Board Procedure Regulation* and the statute under which the decision was made, the Board does not have jurisdiction to hear the appeal, regardless of the merits.

Appeal fees

For a notice of appeal to be complete, it must include the appeal fee of \$25.00. This fee is required by section 3(4) of the *Environmental Appeal Board Procedure Regulation* and cannot be waived by the Board. The fee may be paid by cheque, money order or bank draft made payable to the Minister of Finance.

If the notice of appeal is delivered by facsimile, the appeal fee must be forwarded with a copy of the original notice of appeal before the appeal can be accepted as complete. Until the fee is received, the notice of appeal is deficient (see "Incomplete (deficient) notice of appeal" below).

Time limit for filing the appeal

According to section 3(1) of the *Environmental Appeal Board Procedure Regulation*, every appeal to the Board must be filed within the time allowed

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by the statute that authorizes the appeal. Therefore, to appeal a decision, a party must forward a notice of appeal to the Board office within the time frame specified in the individual statute. A summary of the time limits currently established in the various statutes is provided below:

Statute	Time limit for filing an appeal with the Board
<i>Environmental Management Act</i>	30 days after notice* of the decision being appealed is given
<i>Integrated Pest Management Act</i>	Within 30 days from the date that the decision being appealed was made.
<i>Water Act</i>	30 days after notice* of the order being appealed is given
<i>Wildlife Act</i>	30 days after notice* of the decision being appealed is given

* If "notice" of a decision under the *Environmental Management Act*, *Water Act* or *Wildlife Act* is sent by registered mail to the last known address of the person, the notice is deemed to be served on the person on the date it is actually received by the person or 14 days after the notice was deposited with Canada Post, whichever is earlier.

The Board does not have the power to extend the time limits. If a notice of appeal is not received in the Board office within the time specified the right to appeal may be lost.

Note: *If the delay in filing an appeal is due to improper posting of a notice required by the legislation, the person who wishes to appeal should file a notice of appeal and explain why the posting was defective and when the person first became aware of the decision he or she wishes to appeal. The Board will consider the circumstances and whether the person was prejudiced before determining whether the appeal should be accepted.*

Incomplete (deficient) notice of appeal

If the notice of appeal does not contain the required information and the required fee, it is considered deficient (see above, "How to appeal").

Section 3(5) of the *Environmental Appeal Board Procedure Regulation* sets out the Board's procedure upon receipt of a deficient notice of appeal. The chair may return the notice of appeal to the appellant together with a written notice which:

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- (a) identifies the deficiencies; and
- (b) informs the appellant that the Board is not obliged to proceed with the appeal until a notice of appeal or amended notice of appeal is submitted to the chair by a specified date, with the deficiencies corrected.

If the deficiencies identified by the chair are not corrected by the date specified in the notice of deficiencies, the appeal may be deemed to be abandoned.

Filing a notice of appeal that is deficient will result in delays, as the Board will not take any action on the appeal until the deficiencies are corrected.

Rejection of a notice of appeal

The Board may reject a notice of appeal if:

- (a) the notice of appeal was filed after the time limit for filing an appeal has expired;
- (b) the appellant does not have standing to appeal; or
- (c) the Board does not have jurisdiction over the subject matter of the appeal or the remedy sought.

When a notice of appeal is rejected, the Board will inform the appellant of this in writing, with reasons. Where it is unclear whether it should be rejected, the Board will give the appellant an opportunity to make submissions and provide potential parties with an opportunity to respond.

Preliminary objection

If a respondent, or any other party to an appeal has information that may call into question the appellant's ability to appeal the decision (e.g. no appealable decision was made or the appellant does not have standing), the information should be forwarded to the Board as soon as possible. Failure to do so may result in an unnecessary hearing at significant cost to all involved.

The Board may request submissions from the appellant prior to making a decision on the objection.

Representatives/Legal counsel

A party does not need to be represented by a lawyer in an appeal. Parties may represent themselves (i.e., present their own cases) or have someone

else (e.g., a non-lawyer) act as their spokesperson (*Environmental Appeal Board Procedure Regulation*, section 11). The Board will make every effort to keep the process open and accessible to parties that are not represented by a lawyer.

4.2 Procedure Following Receipt of Notice of Appeal

Notification of the appeal

Once a **complete** notice of appeal or amended notice of appeal is received, section 4(1) of the *Environmental Appeal Board Procedure Regulation* requires the chair of the Board to acknowledge receipt of the notice by forwarding an acknowledgement of receipt to the appellant and a copy of the acknowledgement, together with a copy of the notice or amended notice of appeal, to the official whose decision is being appealed, the applicant (if he or she is a person other than the appellant) and any objectors.

“Objector” is defined in the *Environmental Appeal Board Procedure Regulation* as:

a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

Parties to the appeal

There are always at least two parties to an appeal. The “appellant” is the party that appeals the decision of the government official by filing a notice of appeal with the Board.

The “respondent” in an appeal is the government official who made the decision under appeal.

Other parties may be added in certain circumstances. These other parties are called “third parties”. Adding parties to the appeal is discussed further below.

Adding participants to the appeal

Under section 94(1)(a) of the *Environmental Management Act*, the Board has the discretion to invite any person to be heard in the appeal. This may be done on the Board’s initiative or as a result of a request.

In deciding whether to add a person as a participant in an appeal, and what level of participation to grant, the Board will consider the timeliness of the

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application, the prejudice, if any, to the other parties, whether the applicant has sufficient interest in the proceeding, whether the interest of the applicant can be adequately represented by another party, the applicant's desired level of participation, whether allowing the application will delay or unduly lengthen the proceedings, and any other factors that are relevant in the circumstances.

Normally, the Board will invite the recipient of the order under appeal or the person holding a permit or licence, which is the subject of an appeal to become a party.

Anyone wanting to participate in an appeal should make a written request to the Board as early as possible. The written request should contain the following information:

- (a) the name, address, telephone and fax number, if any, of the person submitting the request;
- (b) whether the person submitting the request intends to be represented by a lawyer and, if so, the name, telephone number and fax number of the lawyer;
- (c) a detailed description of how the person submitting the request can be impacted or affected by the subject matter of the notice of appeal **and** the reasons why the person should be allowed to participate in the appeal; and
- (d) the signature of the person submitting the request.

Prior to permitting a person to participate in an appeal as a party, the Board may provide the other parties to the appeal with an opportunity to make representations. If the Board allows a person to participate in the appeal, it will promptly notify the other parties in writing.

Change in contact information

All parties and participants must promptly notify the Board of any change in their address for service or other contact information. This will ensure that the Board is able to effectively communicate with all parties and participants at all times throughout the appeal process.

Type of appeal hearing (written or oral)

Within 60 days of receiving a complete notice of appeal, the chair is required to determine the appropriate type of appeal (*Environmental Appeal Board*

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Procedure Regulation, section 4(2)). An appeal may be conducted by way of written submissions, an oral hearing or a combination of both.

In most cases, a full oral hearing will be conducted. When a hearing by written submission is being considered for a particular case, the chair may request input from the parties before making a decision on whether to proceed in this manner.

If a party wants to request that an appeal be conducted by oral hearing, written hearing or a combination of both, a request should be forwarded to the Board within a reasonable time after receipt of the complete notice of appeal or amended notice of appeal. The request should set out the reasons in support of the type of appeal procedure proposed. (For more information, see "Scheduling written submissions" under section 4.3 below)

Hearing de novo

A hearing, written or oral, is generally conducted as a "new hearing". This means that the Board may hear new evidence and argument that was not before the previous decision-maker, make findings of fact on the evidence presented to it, and decide questions of law. The Board may also exercise any discretion it has without regard to the evidence presented to, or the conclusions reached by, the decision-maker below.

Joining appeals

Where the Board considers that two or more appeals are related to each other or that some, or all, of the parties are the same, it may consider combining the appeals and dealing with them in one proceeding. The goal of joining appeals is to make the appeal process more efficient.

The Board will notify all parties if it decides to join the appeals. Objections may be made to the Board, in writing.

Where the Board joins a number of appeals against one decision or order, the Board encourages the appellants to appoint one spokesperson for the group and for the appellants to make a joint presentation of evidence and argument.

Amending the Notice of Appeal (adding grounds for appeal)

The grounds for appeal presented in the original notice of appeal should be complete. However, the Board recognizes that there may be occasions when additional grounds of appeal are identified after that time.

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To ensure that the other parties have adequate notice of the new grounds for appeal and have an opportunity to prepare their respective cases, an appellant should file an amended notice of appeal with the Board as soon as possible. Delay in notifying the Board, and the other parties, of the new grounds may result in a postponement or adjournment of the hearing.

Dispute resolution

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences (discussed further under "Oral Hearing Procedure"); and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval (see "Consent Orders" under section 4.5 below). Alternatively, the appellant may withdraw his or her appeal at any time (see "Withdrawing or abandoning an appeal" under section 5.0 below).

4.3 Written Hearing Procedure

Scheduling written submissions

In some cases, the Board will decide that an oral hearing is not required to fairly decide the issues in an appeal. Section 4(2) of the *Environmental Appeal Board Procedure Regulation* allows the Board to conduct an appeal on the basis of written submissions.

Normally, hearings by written submission will be conducted in cases where credibility is not a significant factor in an appeal, there is no dispute about material facts, the issues to be decided have been dealt with in previous appeals or there are purely legal questions to be decided.

If a party wants an appeal to be heard by way of written submissions, that party should make a request to the Board as soon as possible in the process

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and provide reasons in support of this type of appeal procedure being adopted for the particular appeal.

If the Board determines that the appeal can be heard fairly by way of written submissions, it will provide the parties with a submission schedule. In making the schedule, the Board will ensure that each party to the appeal is given an opportunity to review the written submissions from the other parties and is given an opportunity to respond to those submissions from parties adverse in interest. The submissions will normally be scheduled to proceed in the following order:

- (1) appellant's submissions
- (2) respondent's and third party's submissions
- (3) appellant's submissions in reply (no new evidence is to be included)

All submissions must be delivered to the Board office by the dates specified. Submissions must be copied to the other parties as well. Once the deadlines have expired for making submissions, the written hearing is over.

Written hearings are normally decided by one member of the Board, often the chair.

Extension of time to make submissions

If a party is not able to deliver its submissions by the date specified by the Board, the party can request an extension of time to file its written submissions. The request should be made in writing and prior to the specified deadline. The request should include the following information:

- (a) the reasons for extension;
- (b) the length of the extension; and
- (c) whether the other parties to the appeal consent to the extension.

If the other parties do not consent, they may be provided with an opportunity to make submissions on their position with respect to the request.

In deciding whether to grant an extension, the Board will consider the adequacy of the reasons given for the extension, any prejudice to the other parties and any environmental or other impacts that may result from an extension.

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If an extension of time is granted to one party, the submission schedule for the other parties will be similarly extended. The Board will inform all parties of the revised schedule, in writing.

Failure to file submissions

If the **appellant** fails to deliver its written submissions by the specified date, the Board may consider the appeal to be abandoned.

If the other parties to the appeal fail to deliver written submissions by the specified date, the Board may make a decision without hearing from those parties.

Content of submissions

If an appeal is conducted by written submissions, the parties are required to present their **entire** cases in writing. This means that all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports etc.), legal authorities, and argument that the party wants the Board to consider must be included in the submissions (for further information see section 4.4.2, "Evidence", below). As noted earlier, the Board may consider new evidence and argument that was not before the previous decision-maker.

Where there is more than one evidentiary document or legal authority provided with the written submission, the documents and authorities should be numbered consecutively and the number should be referenced, where applicable, in the written text.

The appellant's written submissions should contain all evidence and argument in support of the grounds for appeal and explain why the decision that has been appealed should be different (i.e. changed). The respondent's submissions should provide all evidence and argument in support of the decision being appealed and explain why the appeal should be dismissed. Any party may suggest alternatives to the decision being appealed or recommend additional terms or conditions.

Prior to making a decision, the Board will consider each party's submissions, weigh the evidence provided and apply the correct burden of proof (see "Burden of Proof", below).

Note: *The Board does not receive the information considered by the previous decision-maker. If a party wants to ensure that the Board considers those materials, the party must submit them to the Board as part of its case or ensure that one of the other parties does so.*

Joint Books of Documents and Legal Authorities

Parties should refrain from photocopying a legal authority or document already provided to the Board in the submissions of another party. Photocopying of legislation or policies should be limited to the sections that are considered pertinent and necessary to the Board's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Board asks that parties consider providing a joint book of documents and legal authorities to the Board where possible.

Additional information requested by the Board

Upon receipt of the written submissions, the panel considering the appeal may find that further information is required from one or more of the parties in order to make an informed decision on the appeal. If the panel requests additional information from one or more of the parties, all parties will have an opportunity to respond to that information.

Application to cross-examine witnesses

If it becomes apparent that credibility is a significant factor in the appeal, on its own initiative or at the request of a party, the panel may require evidence to be presented at an oral hearing to allow cross-examination of some or all of the witnesses.

Role of precedent (previous decisions of the Board)

Although the Board may be bound by the decisions of certain courts, it is not required to follow (i.e., is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Board may indicate how the Board members will view particular types of cases, as a matter of law, it must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Public access

In written hearings, the evidence, written submissions and decisions arising from the appeal are available to the public upon request.

4.4 Oral Hearing Procedure

4.4.1 Pre-hearing

Scheduling an oral hearing

Section 4 of the *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing (see "Composition of panels" under section 2.0, and "Type of appeal hearing (written or oral)" under section 4.2).

Where the chair decides that an appeal will be conducted by full oral hearing, the chair is required to set the date, time and location of the hearing and notify the parties, the applicant (if different from the appellant) and any objectors (as defined in the *Environmental Appeal Board Procedure Regulation*). The parties will be consulted on their availability and a reasonable attempt will be made to accommodate the parties' scheduling needs. However, where there is a need to expedite a hearing in order to protect the environment or where the parties cannot agree on a specific date or location, the chair may proceed to set the date and location for a hearing without further consultation with the parties.

An oral hearing may be held at the Board office in Victoria or any other location in the Province. The location of the hearing will be determined on a case-by-case basis. Requests to have a hearing conducted in a particular location will be considered by the Board. Hearings conducted outside of Victoria are often held in meeting or conference rooms in hotels.

The Board will provide the parties with a Notice of Hearing, confirming the commencement date and venue for the hearing.

Request for expedited hearing

The chair will, where possible, attempt to accommodate requests for an expedited hearing. Such requests should be made in writing and include reasons for the urgency. As always, the party making the request should copy the request to all other parties as well as to the Board.

The chair will consider the request having regard to the respondent's right to proper notice of the appeal and the appeal hearing, and the rights of other appellants who are awaiting hearings.

Stays pending appeal

The Board is granted the power to stay a decision or an order pending a final decision on the merits of an appeal. A stay has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal.

A party seeking a stay must apply to the Board, in writing. The written request should set out the reasons why a stay should be ordered and address the following issues:

- whether there is a serious issue to be decided by the Board;
- whether the appellant will suffer irreparable harm if a stay is not granted; and
- whether the “balance of convenience” favours granting a stay.

In addressing the issue of irreparable harm, the party seeking the stay must explain what harm it would suffer if the stay was refused and why this harm is “irreparable” (i.e., it could not be remedied if the party ultimately wins the appeal).

In addressing the issue of “balance of convenience”, the party seeking the stay must show that it will suffer greater harm from the refusal to grant a stay than the harm suffered by the other parties or the environment if the stay is granted.

The Board will notify all parties of the application and provide them with an opportunity to make submissions. The other parties should set out their positions on whether a stay should be granted and should also address the issues of balance of convenience and irreparable harm.

Normally an application for a stay will be conducted in writing.

Statement of Points and exchange of documents

In order to facilitate identification of the main issues and arguments in an appeal and ensure the hearing proceeds in an efficient and expeditious fashion, the Board will send a letter to the parties asking for a Statement of Points (i.e., summary of each party’s case) and the documents that the parties will be referring to and relying upon during the hearing.

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The Board will establish a schedule for an exchange of documents. Typically, the Board will ask the appellant(s) to deliver its Statement of Points and its documents to the Board, and each party to the appeal, at least **30** days prior to the commencement of the hearing. The respondent(s), and all other parties to the appeal, will typically be asked to deliver their respective Statement of Points and documents to the Board, and each party to the appeal, at least **15** days prior to the commencement of the hearing. The Board may alter the schedule if the circumstances warrant doing so.

Statement of Points

The following information should be contained in the Statement of Points:

- (a) The appellant should outline:
 - (i) the substance of the appellant's objections to the decision of the respondent;
 - (ii) the arguments that the appellant will present at the hearing;
 - (iii) any legal authority or precedent supporting the appellant's position; and
 - (iv) the names of the people that the appellant intends to call as witnesses at the hearing.

- (b) The respondent should outline:
 - (i) the substance of the respondent's objections to the appeal;
 - (ii) the arguments that the respondent will present at the hearing;
 - (iii) any legal authority or precedent supporting the respondent's position; and
 - (iv) the names of the people that the respondent intends to call as witnesses at the hearing.

Additional parties to the appeal will be asked to provide a Statement of Points containing the above-noted information as may be relevant to that party.

Where a party has not provided the Board with a Statement of Points by the specified date, the chair has the authority to order the party to do so (see section 7 of the *Environmental Appeal Board Procedure Regulation*).

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Documents

With their Statement of Points, parties are requested to disclose all relevant documents to the Board and the other parties in advance of the hearing so that all parties will be prepared. "Documents" include correspondence, reports, articles, photographs, maps, charts and any other materials (e.g., legislation and policies) that may be referred to or relied upon at the hearing.

Where there is more than one document provided, the documents should be numbered consecutively.

The schedule for exchanging documents does not preclude the parties from the voluntary exchange of documents either before or after the 30- and 15-day deadlines specified above. The Board encourages parties to co-operate in the exchange of information as soon as possible in the appeal process to ensure that the matter proceeds in an informed and expeditious manner. In particular, the respondent is encouraged to provide the appellant with access to copies of the documents, and relevant portions of the legislation, policies and guidelines upon which the respondent relied to reach the decision being appealed.

Failure or Refusal to produce documents before a hearing

If a party refuses to produce a document(s) or other thing in that person's possession or control that is admissible and relevant to an issue in an appeal, an application may be made to the Board to require production of the documents, or other thing, either prior to or during a hearing (see also "Obtaining an order to compel witnesses or order disclosure" for compelling testimony or documents at the hearing).

A request for pre-hearing disclosure of documents should be made in writing to the Board office, and should include the following information:

- (a) the name of the person in possession or control of the document or thing;
- (b) a reasonably detailed description of the documents or items that would enable a reasonable person to know what documents, items or information is being sought; and
- (c) the reasons why such materials are relevant to the subject matter of the appeal.

Where sufficient detail is not provided in the request, the Board may ask for additional information.

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In deciding whether to issue an Order for pre-hearing disclosure, the Board will consider whether the party has requested voluntary compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, and any other factors that the Board considers relevant.

It is important to note that failure or refusal to produce documents prior to the hearing may result in delays and, possibly, an adjournment of the hearing.

If a party produces a document for the first time at the hearing, that party is responsible for providing sufficient copies for the other parties, the panel members, and the official recorder (usually 6 copies).

Joint Books of Documents and Legal Authorities

Parties should refrain from photocopying a legal authority or document already provided to the Board in the submissions of another party. Photocopying of legislation or policies should be limited to the sections which are considered pertinent and necessary to the Board's decision on the issues raised in the appeal. To reduce the unnecessary duplication of legal authorities and other documents, the Board asks that parties consider providing joint books of documents and legal authorities to the Board where possible.

Pre - hearing conferences

The Board may, on its own initiative or at the request of any of the parties to the appeal, schedule a pre-hearing conference. The Board will normally schedule a pre-hearing conference in complex cases or in cases that involve numerous parties.

A pre-hearing conference may be conducted by telephone or in person, depending upon the needs of the parties. Attendance will generally be limited to one member of the Board and one representative from each party to the appeal. Normally, the chair of the Board oversees the pre-hearing conference. These conferences are usually recorded by a court recorder.

Pre-hearing conferences provide the parties with an opportunity to clarify the hearing procedures, narrow the issues to be dealt with at the hearing, and discuss any preliminary concerns. They are intended to facilitate a just, expeditious and inexpensive disposition of the matter.

Some matters that may be discussed at a pre-hearing conference include:

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- defining and simplifying the issues to be determined at the hearing;
- identification of witnesses;
- arranging for the exchange of documents and expert reports;
- any outstanding issues relating to pre-hearing production/disclosure of documents;
- admission of facts relevant to the hearing and consented to by the parties;
- admission of any evidence relevant to the hearing and consented to by the parties;
- setting of hearing dates, timelines, scheduling of witnesses, etc.;
- determination of the day to day conduct of the hearing;
- determination of a date for further pre-hearing conferences prior to the hearing; and
- resolution of the appeal.

A request for a pre-hearing conference should be made in writing and include a list of the items the party wants addressed at the conference. The request should be made as soon as the number of parties to the appeal has been determined and, in any event, no later than **30** days before the hearing unless the Board agrees.

Pre-hearing conferences are of limited value unless all parties come to the conference fully prepared for a useful discussion of all items scheduled to be addressed, and are authorized to negotiate and make decisions with respect to those items. The Board has no authority to compel parties to attend a pre-hearing conference. To be effective, the parties must be willing to attend and be open to discuss all items on the agenda.

These provisions do not preclude voluntary meetings between the parties. The parties are always free to discuss the case among themselves, and to try to resolve the appeal without the need for a hearing or decision by the Board.

Notification of expert evidence

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject

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matter of the appeal. To be an “expert” the person must have knowledge that goes beyond “common knowledge”. (See section 4.4.2 for more information on expert evidence.)

Any party that intends to present expert evidence at a hearing is required to provide the Board, and all other parties to the appeal, with at least 60 days advance notice that an expert will be called to give an opinion. Unless the Board authorizes otherwise, the notice must include:

- (a) a brief statement of the expert’s qualifications and areas of expertise;
- (b) the opinion to be given at the hearing; and
- (c) the facts on which the opinion is based.

If a party intends to produce a written statement or report by an expert(s) at a hearing, a copy of the statement or report must be provided to the Board and all parties to the appeal before the statement or report is given in evidence. Unless there are compelling reasons for later admission and the Board approves a variation of the admission date, expert reports must be distributed **60** days prior to the hearing date. The expert’s qualifications must be included with the report.

After receiving notice of expert evidence, the other parties or party may decide to respond to that expert evidence by presenting their own expert evidence at the hearing. If a party decides to provide expert evidence in response, the party must deliver notice of the expert evidence, including the information described above, no later than **30** days after receipt of the other party’s notice of expert evidence.

The purpose of advance notice of expert evidence is to give the other parties an opportunity to review and consider the expert evidence, and the facts on which it is based, in order to prepare questions to ask at the hearing and to consider whether to submit their own expert evidence.

Failure to provide reasonable notice of expert evidence or expert reports may result in an adjournment of the hearing or exclusion of the intended evidence.

Because the Board has established its own rules for the introduction of expert evidence and the testimony of experts, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board. If there is a conflict between the Board’s rules and sections 10 or 11 of the *Evidence Act*, the Board’s rules on expert evidence apply.

Obtaining an order for attendance of a witness or production of documents

Application for an order

Arranging for the attendance of witnesses, production of documents and other evidence at a hearing must be performed by the parties. It is up to the parties to ask a person or persons to voluntarily attend a hearing, give evidence, and/or provide certain documents.

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring a person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Pursuant to section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act*, the Board has the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

A request for an order requiring a person to attend a hearing to give evidence must be made in writing to the Board office, and should include the following information:

- (a) the name and address of the witness;
- (b) a brief summary of the evidence to be given by the witness, and an explanation of why the evidence is relevant and necessary (e.g. Mr. Smith is the author of a report on water contamination in the X region. He will be able to give evidence on the effects of certain pollutants on the water supply in that area); and
- (c) the attempts made to have the witness **voluntarily** attend the hearing.

A request for an order for the production of documents or other items must be made in writing to the Board office, and should include the following information:

- (a) the name of the person in possession or control of the document or thing;

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- (b) a reasonably detailed description of the documents or items that would enable a reasonable person to know what documents or information is being sought;
- (c) the reasons why such materials are relevant to the subject matter of the appeal; and
- (d) the attempts made to have the person **voluntarily** provide the documents or things.

Where insufficient detail is provided in the request, the Board may ask for additional information.

In deciding whether to issue an order, the Board will consider whether the party has requested voluntary attendance/compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, whether that person is reasonably likely to be able to supply the information, and any other factors that the Board considers relevant.

If an order requiring the attendance of a witness and/or production of documents is granted, the party requesting the order will be responsible for serving it on the person.

Objecting to an order requiring attendance at a hearing

A person (witness) who is subject to an order may apply to the Board to amend the terms of the order or to have it cancelled. The application may be made before or during the hearing. If the Board is satisfied that the evidence sought from the person is irrelevant, is protected by a privilege at law or the person is not able to supply the evidence sought, the Board may cancel or vary the order.

Failure to comply with an order for attendance at a hearing

According to section 34(4) of the *Administrative Tribunal Act*, the Board may apply to the Supreme Court for an order directing the person or any directors and officers of a person, to comply with the Board's order.

Contempt

If a person ordered to attend as a witness fails or refuses to attend a hearing, take an oath or affirmation, answer questions, or produce the records or things in their custody or possession, the Board may apply to the

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court to have that person committed for contempt, as if in breach of an order or judgment of the court (section 49(1) of the *Administrative Tribunal Act*).

Security for costs

Under section 95(1) of the *Environmental Management Act*, the Board has the authority to order an appellant to deposit a sum of money that the Board considers sufficient to cover all or part of the anticipated costs of the respondent and the anticipated expenses of the Board in connection with the appeal.

Under section 95(3) of the *Environmental Management Act*, the Board may make an order for disposal of the money deposited.

The Board has adopted a policy that a security deposit should only be ordered in special circumstances. Those circumstances include:

- (a) where, having regard to all of the circumstances, an appeal is being pursued for improper reasons or is frivolous or vexatious in nature;
- (b) where a participant, without adequate or prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing"; or
- (c) where a party unreasonably delays the proceeding.

The Board is not bound to order a security deposit when one of the above-mentioned examples occurs, nor does the Board have to find that one of the examples must have occurred to order a deposit.

The Board may make an order on its own initiative or upon the request of a party.

A request for a security deposit should be in writing, and should set out the reasons in support of such an order and the suggested amount of the deposit. The appellant may be given an opportunity to make submissions in response to the request.

If an order for deposit is made and the appeal proceeds to an oral hearing, the panel will give directions respecting the disposition of the money deposited at the completion of the appeal, or in its decision.

Submissions on the disposition of the money will be accepted in closing arguments in addition to any submissions regarding costs in general (see "Costs" under section 4.5)

Site visits

Prior to or during a hearing the Board may, on its own initiative or at the request of a party, schedule a site visit. If a party wishes to schedule a site visit, the request should be made as early as possible because additional time in the hearing schedule may be required to accommodate the visit. If the site visit will be on private property, the party requesting the site visit must ensure that the property owner consents to the site visit.

The purpose of a site visit is to provide the panel with the opportunity to learn more about the appeal and better understand the evidence, not to gather evidence. The panel's observations during a site visit are not evidence. A site visit is not to be used as a fact-finding expedition, and new evidence will normally not be accepted, unless in accordance with the rules of procedural fairness and in the presence of the official recorder. Examples of when a site visit would be appropriate include situations where the proximity of certain features on the site to each other or to neighbouring properties is an issue or where an appreciation is needed of the size or scope of an undertaking or natural feature.

Prior to a site visit, the panel and parties will agree upon the date and time of the visit and how the visit will proceed. Normally, the site visit will not be conducted unless all parties to the appeal are present. However, there may be instances where a party has waived its right to attend.

Postponement of the hearing

All parties to an appeal are entitled to a hearing of the appeal in a timely fashion. Accordingly, the Board will only grant a postponement of a hearing when all parties to the appeal consent to the postponement, or when the party requesting a postponement can show that special circumstances exist that justify postponing the hearing to a later date.

A request for a postponement must be made promptly in writing, and copied to all other parties. The request should include the following information:

- (a) the reasons for the request;
- (b) the length of the proposed postponement (specify the next available date); and
- (c) whether the other parties to the appeal consent to the postponement.

In deciding whether to grant this request, the Board will consider a variety of factors including:

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- the adequacy of the reasons provided and the adequacy of any objections to the postponement;
- the number of postponements that have already been granted;
- whether the postponement will needlessly delay or impede the conduct of the hearing;
- whether the purpose for which the postponement is sought will contribute to the resolution of the matter;
- whether the postponement is required to provide a fair opportunity to be heard;
- the degree to which the need for the postponement arises out of the intentional actions or the neglect of the participant seeking the postponement;
- the prejudice to the other parties if a postponement is granted, balanced against the prejudice to the applicant if the postponement is not granted;
- any environmental impacts that may result from a postponement of the hearing;
- the public interest in the efficient and timely conduct of the appeal; and
- any other factors which may be relevant.

Before granting a postponement of a scheduled hearing, and except in extenuating circumstances, the Board will give the other parties an opportunity to be heard. If the other parties to the appeal consent to the postponement, the request will rarely be denied.

4.4.2 Evidence

General

In an oral hearing, each party has the right to present evidence to support that party's case. "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Board to decide the case in a particular way.

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The only evidence the Board will consider is that which is provided to it by the parties. It does not automatically receive the information considered by the previous decision-maker. Therefore, if a party wants to ensure that the Board considers those materials, the party must submit them to the Board as part of its case or ensure that one of the other parties does so.

In some circumstances, the *Evidence Act*, R.S.B.C. 1996, c. 124, may apply to oral and written evidence that is presented at hearings before the Board. Parties should consult that Act to determine whether it may apply. However, as noted above, sections 10 and 11 of the *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board (see "Notification of expert evidence", above).

While most of the information under this heading relates primarily to oral rather than written hearings, the principles involved in weighing evidence and applying the correct burden of proof are common to all methods of appeal.

Admissibility and exclusion of evidence

The rules of evidence, which apply to a hearing before the Board, are less formal than those applied by a court. The Board may admit hearsay and circumstantial evidence if it is considered relevant. Relevance is the primary consideration for the Board when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

The Board may also exclude evidence. This will normally occur when the evidence is of minimal relevance, is unreliable, may confuse the issues, may prejudice the other parties or is a repetition of evidence already presented. In addition, the Board may be obligated to exclude evidence that is privileged or is restricted by a statute, such as the British Columbia *Evidence Act*.

Before any evidence is excluded by the Board, parties will be offered an opportunity to explain why the evidence they are seeking to introduce is relevant and should not be excluded. If evidence is limited or excluded, the Board will advise the parties of its reasons for doing so.

All evidence admitted during the hearing will be assessed by the Board to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Board's purposes will be given less weight when the Board is deciding the appeal.

Evidence that was not before the initial decision-maker

The Board may allow evidence to be presented in a hearing that was not before the previous decision-maker. This is subject to the considerations mentioned above in the previous section, "Admissibility and exclusion of evidence."

If the introduction of the new evidence comes as a "surprise" or there is insufficient time for the other parties to adequately consider the evidence, the Board may grant a short break to allow the other parties time to consider the information, or it may adjourn the hearing to another date.

Agreed statement of facts

Where the parties are in agreement that certain facts are true or events relevant to the appeal happened in a certain way, the parties may submit an "agreed statement of facts" to the Board. An agreed statement of facts can reduce the overall length of the hearing by avoiding the need for the parties to call witnesses or produce evidence at the hearing to prove those facts or events. If an agreed statement of facts is submitted, it will be determinative of those facts for the purposes of the appeal.

Evidence provided by affidavit or telephone

If a witness is unable to attend an oral hearing in person, the Board may allow the witness to testify by telephone or provide their evidence in a sworn written statement (i.e., affidavit). When considering a request to allow evidence to be given by telephone or in an affidavit, the Board will consider any objections from the parties. If the witness is to give affidavit evidence on an important issue in the appeal, the Board may, upon request, order the witness to be available for cross-examination on his or her evidence before or after the scheduled hearing (see "Obtaining an order for attendance of a witness or production of documents" under section 4.4 above).

In some cases, the Board may give less weight to evidence provided by telephone or affidavit, compared to evidence given in person, because it is more difficult to assess a witness' credibility if they do not appear in person.

Expert evidence

As stated in section 4.4.1 under the heading "Notification of expert evidence," an expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

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As stated previously in this section, sections 10 and 11 of the British Columbia *Evidence Act* do not apply to expert evidence that is presented at hearings before the Board, because the Board has established its own rules for the introduction of expert evidence and the testimony of experts. In addition, if there is a conflict between the Board's rules and sections 10 or 11 of the *Evidence Act*, the Board's rules on expert evidence apply.

Experts must be "qualified" by the Board before giving their opinion. Each party will have an opportunity to cross-examine a proposed expert and make submissions before the Board makes a determination on qualifications. This means that the Board must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.

If a person is found not to be qualified to give expert evidence on a particular subject matter, the Board may still receive the witness's evidence. The Board will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given that witness's testimony.

Witness panels

The Board may permit evidence to be given by a number of witnesses sitting as a witness panel. This will normally be allowed when the testimony of two or more witnesses is interconnected and the evidence will be more understandable if the witnesses are able to give their evidence in a chronological fashion. Cross-examination will not take place until all of the witnesses on the panel have presented their evidence-in-chief.

The main restriction on this type of format is that the witnesses cannot discuss the answers to questions with the other witnesses on the panel. Each witness must give his or her evidence without consultation with the other panel witnesses.

Reopening a hearing on the basis of new evidence

Once the record is closed, no additional evidence will be accepted from the parties unless the Board decides that the evidence is material to the issues, there are good reasons for the failure to produce it in a timely fashion, and acceptance of such evidence is in accordance with the principles of natural justice and procedural fairness.

The Board's authority to obtain evidence (extra-record facts)

In discharging its mandate to decide an appeal, the Board may find it necessary to obtain and/or consider information not tendered by the parties

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to the appeal (not on the record of the proceeding). "Information" means factual or legal information.

Before the Board considers such information, all parties will be given prior notice of this information, will be given access to or copies of the information, and will have an opportunity to make submissions and respond to the information.

4.4.3 The Hearing

Role of the panel chair

The member of a panel who has been designated as chair of that panel will be responsible for the general conduct of the appeal hearing.

Record of the hearing

All Board hearings are recorded by an official recorder. Taping of Board proceedings by anyone other than an official recorder is not permitted unless approved by the Board.

Exclusion of witnesses

Prior to giving his or her evidence, the Board may ask a witness, or witnesses, to wait outside the hearing room until the witness is called upon to testify. This may be done on the Board's initiative or at the request of a party.

Swearing-in

When a witness (including parties to the appeal) is called upon to testify, the witness may be asked to give his or her evidence under oath or to affirm that the evidence given will be true. When a spokesperson will also be giving evidence, he or she will be sworn in when that person begins to give evidence. It is not necessary to be sworn in to examine or cross-examine a witness.

Documents as evidence

If a party will be referring to a document that was not provided to the Board and all other parties prior to the hearing, sufficient copies of the document must be brought to the hearing for each member of the panel hearing the appeal, all other parties and the official recorder (usually 6 copies).

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If sufficient copies are not brought to the hearing, it is the responsibility of the party submitting the documents to arrange for, and pay for, copies to be made during the hearing.

Documents entered into evidence at the hearing will be marked as an exhibit to the hearing.

Procedure at the hearing

While Board hearings are not as formal as court proceedings, they are still reasonably formal and parties are expected to act appropriately. The chair of the panel is addressed as "Mister Chair" or "Madam Chair". Surnames should be used when addressing or referring to the other panel members or parties. The degree of formality of a hearing may vary depending on the composition of the panel hearing the appeal, the nature of the parties and the subject matter of the appeal. The following format will generally be followed:

1. The chair of the panel will begin the hearing by identifying the panel members conducting the appeal and the official recorder appointed to record the proceedings. The chair will swear in the official recorder.
2. The chair will state the statutory authority for the Board to hear the appeal and identify the decision that is being appealed. The chair may also clarify with the parties the precise issue(s) to be decided in the appeal.
3. The chair will invite those parties in attendance to introduce themselves for the record.
4. The chair will review the procedures that will apply at the hearing in connection with the presentation of evidence. Where there are multiple appellants, respondents and/or third parties, the order for presenting the parties respective cases will also be addressed. The chair may make a statement regarding the scope of evidence that will be acceptable and other limitations as may be applicable.
5. The parties will be given an opportunity to confirm or to clarify their understanding of the matter at hand and to make any preliminary objections or requests.
6. The chair will then ask the parties for their opening statements, usually in the following order:
 - (1) appellant
 - (2) respondent
 - (3) third party

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The appellant's opening statement is to include the grounds for appeal, the remedy (decision) sought, the names of witnesses (if any) to be called and the approximate time required to put its case before the panel. The respondent's and third party's opening statements should include the remedy (decision) sought, the names of witnesses (if any) to be called and the approximate time required to put their cases before the panel.

7. The chair will advise the appellant to proceed with the presentation of its evidence. The appellant and his or her witnesses may be cross-examined by the respondent and the third party (if present). Members of the panel may also ask the witnesses questions. New information given in response to questions asked by the other parties or the panel is subject to re-examination by the parties to the appeal.
8. The chair will advise the respondent to proceed with the presentation of its evidence. The respondent and his or her witnesses may be cross-examined by the appellant and the third party (if present). Members of the panel may also ask the witnesses questions. New information given in response to questions asked by other parties or the panel is subject to re-examination by the parties to the appeal.
9. The chair will advise the third party (if present) to proceed with the presentation of its evidence. The third party and his or her witnesses may be cross-examined by the appellant and the respondent. Members of the panel may also ask the witnesses questions. New information given in response to questions asked by other parties or the panel is subject to re-examination by the parties to the appeal.
10. The appellant may apply to the panel for the opportunity to call "reply evidence" (e.g. a witness to respond to evidence tendered by the other parties). The application may only be granted if the respondent or third party called evidence that could not reasonably have been anticipated by the appellant.
11. The chair will request the parties to present a closing statement (argument) at the conclusion of all the evidence**. In their closing statements, the parties may wish to suggest alternatives for the panel to consider when making its decision, provided that the evidence presented in the hearing supports the proposed alternatives. The parties should point out or emphasize those facts and/or principles of law that they would like the panel to consider, and the remedy that they are seeking from the Board.

The order of presentation is as follows:

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- (1) appellant
- (2) respondent
- (3) third party
- (4) reply by appellant

No new evidence will be accepted in the closing statement.

** In some circumstances the panel chair will allow, or request that, the parties make their closing submissions to the Board in writing.

12. The chair will advise parties to the appeal that the hearing of evidence is concluded and the "record is closed" (see below).

Objections

If a party wishes to object to something in the hearing (e.g. questions or evidence), that party may raise an objection. An objection should be made in a courteous fashion stating the reasons for the objection. The Board will provide the other party(s) with an opportunity to respond before making a decision on the objection.

Maintenance of Order at hearings

Section 48 of the *Administrative Tribunal Act* gives the Board the power to make orders or give directions that it considers necessary for the maintenance of order at the hearing. For instance, it may impose restrictions on a person's continued participation in or attendance at a hearing, or it may exclude a person from further participation in an appeal or attendance at the hearing until the Board orders otherwise.

If the person who is subject to the order or direction disobeys, refuses, or fails to comply with the order or direction, the Board may call on the assistance of any peace officer to enforce the order or direction (section 48(1) of the *Administrative Tribunals Act*), or it may apply to the court to commit the person for contempt of the order or direction (section 49(2) of the *Administrative Tribunals Act*).

Adjournments

An adjournment is a discontinuation of a hearing which is in progress. The Board will make every effort to complete a hearing within the time scheduled. However, if a hearing is not concluded within the allotted time, a party is "surprised" by previously undisclosed evidence, or another problem arises, the Board may exercise its discretion to adjourn the proceeding until a later date.

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If a party requests an adjournment, the Board will consider the following:

- the views of the other parties;
- the adequacy of the reasons provided for the adjournment and the adequacy of any objections to the adjournment;
- the number of adjournments or postponements that have already been granted;
- whether the adjournment will needlessly delay or impede the conduct of the hearing;
- whether the purpose for which the adjournment is sought will contribute to the resolution of the matter;
- whether the adjournment is required to provide a fair opportunity to be heard;
- the degree to which the need for the adjournment arises out of the intentional actions or the neglect of the participant seeking the adjournment;
- any prejudice to the other parties if an adjournment is granted, balanced against the prejudice to the applicant if the adjournment is not granted;
- any environmental impacts that may result from a postponement of the hearing;
- the public interest in the efficient and timely completion of the appeal;
and
- any other factors which may be relevant.

Closing of the record

At the conclusion of the hearing, the record will be closed unless the panel directs otherwise. Once the record is closed, no additional evidence will be accepted unless the panel decides the evidence is material and that there was a good reason for the failure to produce it in a timely fashion.

Additional information requested by the Board

After the oral hearing is completed, the Board may find that further information is required from one or more of the parties in order to make a

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decision on the appeal. If the Board requests additional information from one or more of the parties, all parties will have an opportunity to respond to that information.

Role of precedent (previous decisions of the Board)

Although the Board may be bound by the decisions of certain courts, it is not required to follow (i.e. is not bound by) its past decisions or the decisions of other administrative agencies. While prior decisions of the Board may indicate how the Board will view particular types of cases, as a matter of law, it must decide each case on its own merits.

Burden of proof

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities".

Public access

Section 8 of the *Environmental Appeal Board Procedure Regulation* requires that all hearings be open to the public.

Media coverage

Radio, television, filming, videotaping or recording of Board proceedings may be permitted at the discretion of the Board, subject to any terms and conditions the Board may impose.

Permission to do any of the above should be sought prior to the commencement of the hearing.

4.5 Decisions

How a decision is made

Only those Board members who sat on the panel that heard the appeal will make the decision.

In making its decision, the panel members are required to determine, on a balance of probabilities, what occurred and decide the issues raised in the appeal. They will evaluate the evidence presented and apply the relevant legislation and legal authority. As a general rule, the panel is not bound by government policy.

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Powers of the Board

For the most part, the decision-making powers of the Board are broad. Under the *Environmental Management Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*, the Board has the power to:

- (a) send the matter back to the person who made the decision being appealed, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the Board considers appropriate in the circumstances.

When a decision will be made

Pursuant to section 6 of the *Environmental Appeal Board Procedure Regulation*, the Board must give written reasons for a decision. Normally, a written decision will be rendered within a reasonable time following the hearing.

On rare occasions, a decision may be rendered at the conclusion of an oral hearing. If this occurs, the panel will provide its written reasons within a reasonable time following the oral decision.

When a hearing has been conducted by written submissions, a final decision will be given in writing, with reasons, within a reasonable time after the last submissions were delivered to the Board's office.

The time required to issue a decision will vary depending on the nature of the appeal, the length of the hearing, and the complexity of the issues involved.

The Board will notify all parties to an appeal when the decision has been rendered and is available on the Board's website. A copy of the decision will be mailed to all parties involved in an appeal, and may be faxed to a party upon request. The decision will also be sent to the responsible minister's office.

Copies of Environmental Appeal Board decisions are available upon request from the Board office and from the following libraries:

- Legislative Library
- University of British Columbia Law Library

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- University of Victoria Law Library
- British Columbia Court House Library Society
- West Coast Environmental Law Library

Decisions are also located on the Board's website (www.eab.gov.bc.ca) and on the Quicklaw Data Base.

Consent Orders

Occasionally, after an appeal has been filed, the parties to the appeal will find a solution to the issues raised in the appeal. The Board encourages the parties to find a mutually agreeable resolution of the issues prior to the appeal hearing. If this occurs, the parties may ask the Board to endorse the agreement and bring an end to the appeal by way of a consent order.

If the parties to an appeal have reached an agreement that will resolve the issues in the appeal, and want the Board to issue a consent order that includes the terms of their agreement, the request should be submitted to the Board as early as possible. The parties should provide a draft of the consent order, signed by all of the parties, to the Board for its consideration and approval.

When the Board approves a consent order, all or part of the appeal, as specified in the order, will be closed, and the Board will provide a copy of the approved order to the parties.

Costs

Section 95(2) of the *Environmental Management Act* provides the Board with the power to order costs in respect of an appeal.

Party-and-Party Costs

Subsection 95(2)(a) authorizes the Board, subject to the regulations, to require a party to pay all or part of the costs of another party in connection with the appeal. A party seeking costs under this section may make a submission to the panel hearing the appeal with respect to an award of costs at the conclusion of the hearing.

The panel will not make an order for costs unless a party requests that it be awarded costs. However, the panel may, on its own initiative, ask a party whether it seeks costs.

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The Board has not adopted a policy that follows the civil court practice of “loser pays the winner’s costs.” The objectives of the Board’s costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct. Thus, the Board’s policy is to award costs in special circumstances. Those circumstances include:

- (a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;
- (b) where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;
- (c) where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a “notice of hearing”;
- (d) where a party unreasonably delays the proceeding;
- (e) where a party’s failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and
- (f) where a party has continued to deal with issues which the Board has advised are irrelevant.

A panel of the Board is not bound to order costs when one of the above-mentioned examples occurs, nor does the panel have to find that one of the examples must have occurred to order costs.

The panel will not order a party to pay costs unless it has first given that party an opportunity to make submissions on this issue. If the panel orders that all or part of a parties costs be paid, the panel may ask for submissions with respect to the amount of costs incurred.

The costs payable to a party under subsection 95(2)(a) will be determined on the basis of Rule 57(1) and Appendix B of the B.C. *Supreme Court Rules*, which lists items for which costs can be awarded, as well as the corresponding number of units for each item. The panel will decide the scale under which costs are to be assessed. The scale chosen depends on the difficulty of the matter being appealed and provides increasing dollar values for matters of greater difficulty.

The Board’s Expenses

Where the panel considers that the conduct of a party has been frivolous, vexatious or abusive, the panel may order that party to pay all or part of the expenses of the Board in connection with the appeal (subsection 95(2)(b) of the *Environmental Management Act*). Decisions of the courts defining

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conduct that is frivolous, vexatious and abusive may be used to assist the panel in determining whether to apply this subsection.

Expenses of the Board that a party may be required to pay under subsection 95(2)(b) of the *Environmental Management Act* include:

- a) recorder fees;
- b) per diems of Board members on the panel;
- c) travel expenses;
- d) hotel costs; and
- e) charges for the hearing room.

These expenses will vary based on such factors as the nature and location of the appeal, the number of days of the hearing, and the number of panel members sitting on the appeal.

The panel will not order a party to pay costs unless it has first given that party an opportunity to make submissions on this issue. If the panel orders that the Board's costs be paid, the panel may ask for submissions with respect to the amount of costs incurred.

Review of Board decisions

There is no right of appeal to the courts from a Board decision. Section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the B.C. Supreme Court for a judicial review of the decision pursuant to the *Judicial Review Procedure Act*.

5.0 ADDITIONAL PROVISIONS

Computing time

Section 25 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, applies to all time limits set out in statutes, such as the time limits for filing Notices of Appeal. As a matter of policy, the Board takes direction from section 25 of the *Interpretation Act* for the purposes of computing other time periods set

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out in this Procedure Manual, such as the time periods for delivering Statements of Points and expert reports.

References in this Procedure Manual to “days” means calendar days. Where the time for doing something described in this Procedure Manual, except filing a Notice of Appeal, falls on a Saturday, Sunday or statutory holiday, the act may be done on the next business day. If a document other than a Notice of Appeal is received by the Board after 4:30 p.m. but before midnight, it may be deemed to be received on the next business day. A Notice of Appeal received before midnight will be deemed to be filed on that calendar day.

Audio-visual requirements

If a party wants to use an overhead projector, flip chart, VCR, etc., at a hearing, that party should confirm the availability of such items with the venue scheduled for the hearing (e.g. hotel, Board office) and make arrangements accordingly. The cost of such equipment will be borne by that party.

Interpreters and other accommodations

If a party, a witness, or his or her representative requires an interpreter and /or any other accommodation (e.g. services to assist the visually or hearing impaired) to enable their meaningful participation at the hearing, the Board will, at the request of the participant or on its own motion, make every effort to accommodate the participant's needs, as is reasonable in the circumstances. The person requesting interpretation or other accommodation should notify the Board as early in the appeal process as possible.

Failure to attend proceedings

Where notice of a preliminary meeting, pre-hearing conference or an oral hearing has been properly given and a party fails to attend, the Board may proceed in that party's absence.

Withdrawing or abandoning an appeal

An appellant may withdraw his or her appeal by so informing the Board in writing, or orally on the record during the course of a hearing.

Transcripts

Under section 10 of the *Environmental Appeal Board Procedure Regulation*, any person may apply to the Board for a transcript of Board proceedings. The cost of a transcript will be borne by the applicant(s).

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Legal counsel to the Board

The Board may appoint and direct its legal counsel to:

- (a) advise the Board on matters of law and procedure and on such other matters as the Board requests;
- (b) ask questions of the witnesses retained by the Board; and
- (c) question witnesses.